INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Argument	5
Conclusion	9

CITATIONS

Cases:

Acers v. *United States*, 164 U. S. 388 8
Bloch v. *United States*, 221 F. 2d 786 8
Friedberg v. *United States*, 348 U. S. 142 ..... 1, 7
Holland v. *United States*, 348 U. S. 121 ..... 1, 6, 7
Smith v. *United States*, 348 U. S. 147 1
United States v. *Atkinson*, 297 U. S. 157 8
United States v. *Calderon*, 348 U. S. 160 1
Yee Hem v. *United States*, 268 U. S. 178 7
Zamloch v. *United States*, 187 F. 2d 854 4

Statute:

Internal Revenue Code of 1939, Sec. 145 (26 U. S. C. 1952 ed., Sec. 145) 2

349556—55

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 104

AUSTIN F. McFEE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The original opinion of the Court of Appeals affirming the judgment of the District Court is reported at 206 F. 2d 872 (R. 444–456). The *per curiam* opinion of this Court vacating the judgment and remanding the cause to the Court of Appeals for consideration in light of the net worth cases decided December 6, 1954,[1] is reported at 348 U. S. 905. The *per curiam* opinion of the Court of Appeals reaffirming the judg-

[1] *Holland* v. *United States*, 348 U. S. 121; *Friedberg* v. *United States*, 348 U. S. 142; *Smith* v. *United States*, 348 U. S. 147; *United States* v. *Calderon*, 348 U. S. 160.

ment of the District Court (Pet. App. 1; R. 492) is reported at 221 F. 2d 807.

JURISDICTION

The judgment of the Court of Appeals was entered April 29, 1955 (R. 493), and the petition for a writ of certiorari was filed on May 27, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Whether the judgment of the Court of Appeals conforms with the principles set forth in the net worth decisions.

2. Whether it was error for the trial court to comment, during its instruction to the jury, on the fact that certain primary records were not produced by the defense to contradict the Government's prima facie case.

3. Whether the trial court's instruction as to willfulness constituted plain error.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any

person who willfully attempts in any manner ner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

STATEMENT

Reference is made to the Government's prior brief in opposition in this case (No. 414, October Term, 1953) for a detailed statement of the facts involved, with record references. In brief, the Government proved unreported income of $70,000 to $80,000 for the years 1945 and 1946 by limiting the possible extent of funds accumulated prior to those years and by establishing that petitioner expended large sums during the prosecution years which exceeded his known resources plus his reported income. A likely source of this unreported income was shown to be petitioner's slot machine business, the magnitude of which appears from the fact that the gross receipts actually recorded on the books ranged from $140,000 to $246,000 for the years from 1942 to 1946, inclusive. The amounts collected by petitioner's route men from his machines were recorded in books of receipts containing an original and two car-

bons of each receipt. These receipts, although requested, were never furnished to the agents and were not produced at the trial. When internal revenue agents discovered that petitioner had spent considerably more than his reported income during 1945–1946, petitioner told the agents that the source of these expenditures was a cash fund of $50,000 which he had at the close of 1941. The Government showed that, on the basis of the income reported on his returns and his known expenditures, he could not have accumulated this sum by 1941, and that even if he had, it would have been exhausted by his expenditures in excess of reported income during 1943 and 1944. One of petitioner's witnesses testified that petitioner had assets worth over $100,000 in 1943 which the Government had not taken into account.[2] The Court of Appeals described the testimony of this

[2] After the original petition for certiorari had been filed (No. 414, October Term, 1953), petitioner lodged with the Clerk of this Court some additional evidence as to this alleged asset upon which great reliance is placed in the present petition (Pet. 9, 15–16, 17). This material was not before the Court of Appeals when it originally decided the case, and there is nothing to indicate that it was considered on the remand although it was filed in that court and discussed in petitioner's brief. It was not at any time presented to the District Court, although petitioner himself admits that he showed it to his attorneys during the trial (R. 487). Obviously, petitioner cannot rely on such evidence at this stage of the case. It should have been presented to the District Court either during the trial or by appropriate motion thereafter. *Zamloch* v. *United States*, 187 F. 2d 854 (C. A. 9).

witness as "contradictory and highly questionable" (R. 450).

ARGUMENT

1. Petitioner contends (Pet. 15–22) that the opening net worth was not established with reasonable certainty in that petitioner had additional assets not taken into account amounting to about $114,000. He also contends (Pet. 11–14) that his collection system was such as to preclude his having obtained unrecorded amounts from his slot machine business and argues that there was thus no evidence of a likely taxable source from which the jury could reasonably find that the net worth increases sprang.

In answer to petitioner's argument that in 1943 he personally had on hand approximately $114,000 in cash which was omitted from the starting net worth, the Court of Appeals reviewed the evidence in its original opinion as follows (R. 450):

> Substantial evidence appearing in the record justifies the inference that no such asset existed. The revenue agent testified that he did not give appellant credit for this item because it represented numerous purchases of whisky and not a single transaction. Any whisky on hand in 1945 was included in the net worth statement as inventory. He further testified that appellant informed him that this item would be accounted for on the Foresters Club books and that it related to whisky inven-

tory turnover. The contradictory and highly questionable testimony of R. E. McDonnell was the only affirmative evidence concerning this transaction. At one point during his testimony the trial court found it necessary to caution the witness against testifying falsely. The jury no doubt disbelieved McDonnell.

As to the source of the unexplained net worth increases the jury could properly have concluded that petitioner's slot machine collection and accounting system was "more consistent than truthful, and that many items of income had disappeared before they had even reached the recording stage." *Holland* v. *United States,* 348 U. S. 121, 132. Such a conclusion was warranted here, where petitioner was the sole owner of a prosperous business capable of producing much more income than was reported; where he failed to turn over to the revenue agents or introduce into evidence the original receipt books which were "reasonably susceptible of being checked," (*Holland* v. *United States,* 348 U. S. at 138); and where his purported explanation of the increases, a prior accumulation, was refuted by the evidence. Under the circumstances, the jury could properly have concluded that his books were unreliable, that the Government's refutation of his explanation negatived all non-taxable sources of the increases, and that the only reasonable conclusion was that they were attributable to his

earnings.[3] *Holland* v. *United States,* 348 U. S. at 137–138.

2. Petitioner renews his contention (Pet. 22–24) that the trial court erred in commenting on his failure to produce the receipt books of the slot machine route men. This argument was dealt with at pages 16 to 18 of our original brief in opposition, to which the Court is respectfully referred. A taxpayer's failure to produce important records which are in his exclusive possession is a circumstance which, like all others, the jury is entitled to consider in the determination of his innocence or guilt, and one which may be commented upon by the court. "The Government must * * * prove every element of the offense beyond a reasonable doubt * * *." But "[o]nce the Government has established its case, the defendant remains quiet at his peril." *Holland* v. *United States,* 348 U. S. at 138–139. Though a jury may not indulge a presumption against a defendant who fails to take the stand, as the court here instructed the jury (R. 422), it may consider the failure of the defense to counter the strength of the Government's case. *Yee Hem* v. *United States,* 268 U. S. 178, 185.

3. Petitioner also complains (Pet. 24–25) of the trial court's instructions as to willfulness (R.

[3] In *Friedberg* v. *United States,* 348 U. S. 142, the taxpayer reported more income than was shown by the books of his tailoring business. The Government was able to prove that taxpayer had received certain payments which had not been entered on the books. But it could not establish that these

419) to which no objection was made at the trial. This contention is not timely. Rule 30 of the Rules of Criminal Procedure provides that: "No party may assign as error any portion of the charge * * * unless he objects thereto before the jury retires to consider its verdict * * *." Nor do we think that this instruction constitutes "plain error" warranting reversal under Rule 52 (b) notwithstanding the explicit requirements of Rule 30. See *United States* v. *Atkinson*, 297 U. S. 157, 160. But cf. *Bloch* v. *United States*, 221 F. 2d 786 (C. A. 9th), where defendant, unlike petitioner, had excepted to other portions of the charge as to willfulness. In any event, the instructions in this case fairly informed the jury of the elements of the offense and could not have been understood as a direction to convict petitioner on any theory of presumptive intent. Cf. *Acers* v. *United States*, 164 U. S. 388. In addition to the statements quoted by petitioner (Pet. 24), the trial court charged that in order to convict the jury must find that taxpayer "attempted to evade or defeat the taxes due on this additional income by purposefully failing to report all the income he knew he re-

---

had been omitted from taxpayer's return since there existed no breakdown of taxpayer's total income as reported in the return. Taxpayer's tailoring business was, nevertheless, the "likely source" of his unexplained increases in net worth. These facts appear in the record in this Court (see brief for the United States, No. 18 O. T. 1954, pp. 6–9), although they are not mentioned in the opinion which is devoted largely to a discussion of the adequacy of the starting point.

ceived during the years 1945 and 1946" (R. 414), and that in "arriving at the intent of the defendant" the jury should "take into consideration all of the facts and circumstances shown by the evidence" (R. 416).

CONCLUSION

The decision below properly applied the principles announced by this Court in the net-worth cases and is in full compliance with the mandate of this Court. No additional issues are presented which should be reviewed by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
ELLIS N. SLACK,
JOHN H. MITCHELL,
JOSEPH M. HOWARD,
DICKINSON THATCHER,
Special Assistants to the Attorney General.

JUNE 1955

U. S. GOVERNMENT PRINTING OFFICE: 1955